TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~343~~ 740

THE SECOND NATIONAL BANK OF LEAVENWORTH, WILLIAM P. BORLAND, AND AUSTIN M. CLARK, PLAINTIFFS IN ERROR,

vs.

F. R. HUNT, ASSIGNEE OF W. T. KELLER AND MARY K. GLADDING, AS PARTNERS, BANKRUPTS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED DECEMBER 10, 1869.

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1 Pleas before the Hon. Samuel F. Miller and the Hon. Mark W. Delahay, judges of the circuit court of the United States of America in and for the district of Kansas, at a term of said court begun and held in the city of Topeka, in said district, on Monday, the 24th day of May, A. D. 1869.

FREDERIC R. HUNT, ASSIGNEE OF WILLIAM T. Keller and Mary K. Gladding, as partners, bankrupts, plaintiff,
vs.
THE SECOND NATIONAL BANK OF LEAVENWORTH, William P. Borland, and Austin M. Clark, defendants. } 186.

Be it remembered that heretofore, to wit, on the 16th day of February, A. D. 1869, came Frederic R. Hunt, assignee of William
2 T. Keller and Mary K. Gladding, as partners, bankrupts, plaintiffs, by Hurd and Stillings, and Clough and Wheat, his attorneys, and filed in the office of the clerk of the circuit court of the United States for the district of Kansas, at Topeka, in said district, a petition against The Second National Bank of Leavenworth, William P. Borland, and Austin M. Clark, and also at the same time filed in the said clerk's office his precipe for a summons and security for costs in the said entitled cause; which said petition, precipe, and security for costs are in the words and figures following, to wit:

3 UNITED STATES OF AMERICA, *District of Kansas, ss:*

In the circuit court of the United States for the district of Kansas.

FREDERIC R. HUNT, ASSIGNEE OF WILLIAM T. Keller and Mary K. Gladding, as partners, bankrupts, plaintiff,
vs.
THE SECOND NATIONAL BANK OF LEAVENWORTH, William P. Borland, and Austin M. Clark, defendants. } Petition.

The said Frederic R. Hunt, who is assignee in bankruptcy of William T. Keller and Mary K. Gladding, as partners, bankrupts, the plaintiff in this case, complains of The Second National Bank of Leaven-
4 worth, William P. Borland, and Austin M. Clark, the defendants herein:

For that, in and by the district court of the United States for the district of Kansas, at a court of bankruptcy held at the city of Topeka, in said district, on the 29th day of April, 1868, William T. Keller & Mary K. Gladding were as partners, by the consideration and judgment of said court at the April term thereof, A. D. 1868, adjudged bankrupts on the petition of John C. Neelsen & Joseph J. Mersman, as partners, under the name, style, & firm of Neelsen & Mersman, filed in said court on the 24th day of September, 1867, who then were, & who had for a long time before that time been, creditors of the said William T. Keller & Mary K. Gladding, as partners, in more than the sum of two hundred and fifty dollars.

And said plaintiff further avers that, at a meeting of the creditors

of said bankrupts, held at the office of Hiram Griswold, register in bankruptcy for said district, in the city of Leavenworth, in said district, on the 22d day of May, 1868, the said plaintiff was chosen assignee of the estate of said bankrupts, the said Keller & Gladding, and that he immediately accepted the trust, and expressed in writing his acceptance of the same, the trust thus reposed in him.

And said plaintiff further avers that afterwards, to wit, on the 22nd day of May, A. D. 1868, said Hiram Griswold, as register in bankruptcy in and for said district, did, by an instrument under his hand, assign and convey to said plaintiff, as such assignee, all the estate, real and personal, of the said William T. Keller & Mary K. Gladding, partners, bankrupts, as aforesaid, including all the property of whatever kind of which they were possessed, with all their deeds, books, & papers relating thereto.

And said plaintiff further avers that the proceedings in bankruptcy aforesaid were commenced on the 12th day of August, 1867, on which day the petition aforesaid was sworn to, & the same was filed in said court on the 24th day of September aforesaid.

And said plaintiff further avers that, within four months before the filing of said petition in said court, said William T. Keller and Mary K. Gladding, as partners, in the city of Leavenworth, in said district of Kansas, owned & were then and there possessed of the following-described property of great value, to wit: Of the value of ten thousand dollars, which property is described as being the lot & stock of liquors, wines, high wines, tobacco, cigars, and other property, consisting in part of barrels, store fixtures, drugs, chemicals, materials, & mixtures, & apparatus for the preparation & manufacture of liquors, wines, and high wines, then situate & being in the building situate on the northwest corner of Cherokee & Second streets, in the city of Leavenworth aforesaid, then occupied by them, and the lot and stock of liquors, high wines, wines, & barrels then in the cellar of the building then occupied by the Second National Bank aforesaid on Delaware street, in the city aforesaid, and certain notes, due bills, accounts, & books of account then owned by and due to said Keller & Gladding, as partners.

And said plaintiff further avers that at the time last aforesaid the said William T. Keller and Mary K. Gladding were, as such partners, indebted to The Second National Bank aforesaid in a large sum, to wit, in the sum of two thousand dollars; and that said William T. Keller & Mary K. Gladding were then, and were on the first day of July, 1867, and have ever since then been, insolvent; and that they then, as such partners, owed divers large sums of money, amounting in the aggregate to more than fourteen thousand dollars, which yet remain unpaid, and that said William T. Keller and Mary K. Gladding, partners, being insolvent, did, in contemplation of insolvency, within four months of and before the filing of said petition against them, to wit, on the 24th day of July, 1867, and whilst they resided in said district, and owed the debts above mentioned, with a view to give a preference to The Second National Bank aforesaid, who was then one of their creditors, as such creditor, and to whom they were then indebted as aforesaid, & with a view to prevent their property coming to their assignee in bankruptcy, and to prevent the same from being distributed under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867, and to defeat the object of said act, and to impair, hinder, impede, and delay the operation and effect of

said act, and to evade the provisions of said act, and with intent to delay, defraud, & hinder their creditors, (of whom they had then many others than these said defendants,) sold and delivered, transferred & conveyed, & made a transfer & conveyance, of their aforesaid property, & disposed of the same to the said William T. Borland, for the use and benefit of The Second National Bank of Leavenworth aforesaid, in fraud of the provisons of said act, and with the intent, by such disposition of their property, to defeat and delay the operation of said act.

10 And said plaintiff further avers that said William P. Borland was then and there cashier and the said Austin M. Clark was then and there president of The Second National Bank of Leavenworth aforesaid, and that they were each of them stockholders of, and interested in, the said bank, and they, each of them, as well as the bank aforesaid, were to be greatly benefited thereby, and by the aforesaid sale, transfer, & delivery of the property aforesaid, which sale, transfer, & delivery was so made at the instance & request of each & all of the defendants herein; and that the defendant herein then & there received said property so as aforesaid sold, delivered, transferred, conveyed, & disposed of, and at the same time they, and each of them, & the officers & agents of said bank, its said president & cashier, had reasonable cause to believe that William T. Keller & Mary K. Gladding were then

11 insolvent & were so acting in contemplation of insolvency, and that such sale, delivery, transfer, & conveyance of said property was made with a view to prevent their, the said Keller & Gladding's, property from coming to their assignee in bankruptcy, and to prevent the same from being distributed under said act, and to defeat the object of said act, and to impair, hinder, impede, and delay the operation & effect of said act, and to evade the provisions of said act, and that a fraud on said act was intended by said Keller and Gladding to be thereby committed and perpetrated, and that sale, transfer, conveyance, and disposition of said property was made with intent to hinder, delay, and defraud the creditors of the said Keller & Gladding.

And said plaintiff further avers that the aforesaid conveyance,

12 sale, transfer, & delivery of the aforesaid property was not made in the usual and ordinary course of business of the said William T. Keller & Mary K. Gladding, they having been, for a long time before then, engaged in the business of keeping and transacting a business known as that of keeping a wholesale & retail liquor store in said city, that having been their usual and ordinary business as such partners, and that said defendants have converted and disposed of the property aforesaid to their own use, and have collected on the accounts, notes, & due bills, a large sum of money, to wit, one thousand dollars; and that heretofore, to wit, on the 15th day of February, A. D. 1869, at said district, said plaintiff, as such assignee, demanded of and from said defendants the property, book accounts, notes, due bills, &

13 books of account aforesaid, and said defendants then and there neglected & refused to deliver the same or any thereof to him, to his damage, as such assignee, in the sum of ten thousand dollars.

And said defendants, though often requested, have hitherto & still do wholly neglect and refuse to pay to said plaintiff the several sums of money above mentioned, or any or either of them, or any part thereof, and refuse to account to or with said plaintiff of or concerning or for or on account of any of the matters aforesaid.

Wherefore plaintiff prays & demands judgment against said defendants for the sum of ten thousand dollars, with interest thereon at the

rate of seven per cent. per annum from the 24th day of July, A. D. 1867, & for costs of suit, &c.

HURD & STILLINGS &
14 CLOUGH & WHEAT,
Attorneys for Plaintiff.

The clerk of the above-named court will please issue a summons in the above-entitled suit, and direct the same to the marshal of the United States for the district of Kansas, and make the same returnable in ten days from the date thereof. Suit brought for the recovery of money.

The plaintiff claims judgment for the sum of ten thousand dollars, with interest thereon at the rate of seven per cent. per annum from the 24th day of July, A. D. 1867, and for costs of suit, &c.

HURD & STILLINGS and
CLOUGH & WHEAT,
Attorneys for Plaintiff.

Which petition and precipe was and is endorsed in words and
15 figures as follows, to wit:

No. 186. F. R. Hunt, assignee, &c., against The Second National Bank of Leavenworth, William P. Borland, & Austin M. Clark. Petition & precipe.

Filed Feb. 16, 1869, A. S. Thomas, clerk. Hurd & Stillings & Clough & Wheat, attorneys for plaintiff.

UNITED STATES OF AMERICA, *District of Kansas, ss:*

In the circuit court of the United States for the district of Kansas.

16 FREDERIC R. HUNT, ASSIGNEE OF WILLIAM T. Keller and Mary K. Gladding, as partners, bankrupts, plaintiff,
against
THE SECOND NATIONAL BANK OF LEAVENWORTH, William P. Borland, and Austin M. Clark, defendants.

We enter ourselves security for costs in said case, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and, in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, we hereby agree and stipulate that execution may issue against our property for any costs taxed against him.

Dated this 15th day of February, 1869.

WILLIAM McNEILL CLOUGH.
E. STILLINGS.

17 Which said security for costs was and is endorsed in words and figures as follows, to wit:

No. 186. F. R. Hunt, assignee, &c., against The Second National Bank of Leavenworth et als. Security for costs.

Filed Feb. 16, 1869.

A. S. THOMAS, *Clerk.*

Whereupon, on the 16th day of Feb., 1869, there was issued by the clerk of said court a writ of summons, which is in the words and figures following, to wit:

Circuit court of the United States of America.

DISTRICT OF KANSAS, *ss:*

The United States of America to the marshal of the district of Kansas, greeting:

You are hereby commanded to notify The Second National
18 Bank of Leavenworth, William P. Borland, and Austin M. Clark that they have been sued by Frederic R. Hunt, assignee of William T. Keller and Mary K. Gladding, as partners, bankrupts, in the circuit court of the United States for the district of Kansas, and that, unless they ansered, by the 18th day of March, A. D. 1869, the petition of the said Frederic R. Hunt, assignee of William T. Keller and Mary K. Gladding, as partners, bankrupts, against them filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ on the 26th day of February, A. D. 1869.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Topeka, in said district, this 16th day of February, in the year of our Lord one thousand eight
19 hundred and sixty-nine, and of our independence the year.

[SEAL.] A. S. THOMAS, *Clerk.*

Which said summons was and is endorsed in words and figures as follows, to wit:

Action brought for the recovery of money. The plaintiff demands judgment for the sum of $10,000 00, with interest from the 24th day of July, A. D. 1867, at the rate of 7 per cent. per annum.

HURD & STILLINGS,
CLOUGH & WHEAT,
Attorneys for Plaintiff.

And further endorsed as follows, to wit:

No. 186. Circuit court of the United States, district of Kansas. F. R. Hunt, assignee, etc., vs. The Second National Bank of Leaven-
20 worth et al. Summons issued Feb'y 16, 1869; returnable Feb'y 26, 1869.

And further endorsed with marshal's return as follows, to wit:

Received this summons on the 19th day of February, A. D. 1869, at 11 o'clock a. m., and on the same day I served the same on the within-named defendants, Austin M. Clark and William P. Borland, by delivering a copy thereof to each of them personally, in my district; and I also then served the said summons on The Second (2d) National of Leavenworth, within named, by delivering a copy thereof to Austin M. Clark, its president, and by delivering another copy thereof to William P. Borland, its cashier, in my district.

CHA'S C. WHITING,
U. S. Marshal, District of Kansas,
21 By H. MARKSON, *Deputy.*

And further endorsed with filing as follows, to wit:

Filed Feb'y 22d, A. D. 1869.

A. S. THOMAS, *Clerk.*

And afterwards, to wit, on the 13th day of March, A. D. 1869, the said defendants in this case, by Sherry & Helm, their attorneys, filed in the said clerk's office of said court their answer in this case, which is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *District of Kansas:*

In the circuit court of the United States for the district of Kansas.

FREDERIC R. HUNT, ASSIGNEE OF WILLIAM T. Keller and Mary K. Gladding, as partners, bankrupts, pl'ffs,
22 *vs.*
THE SECOND NATIONAL BANK OF Leavenworth, William P. Borland, and Austin M. Clark, defendants. } Answer.

This day come the defendants in above case and for answer to the petition of plaintiffs in said case deny each and every the allegations of said plaintiffs in their said petition contained

SHERRY & HELM,
Att'ys for Defendants.

Which said answer was and is endorsed in words and figures as follows, to wit:

No. 186. Fred. T. Hunt, assignee of W. T. Keller and Mary K. Gladding, pl't'ff, v. 2 Nat. Bank, W. P. Borland, & Austin M. Clark,
23 defendants. Answer. Filed March 13, 1869. A. S. Thomas, clerk. U. S. circuit c't. Sherry & Helm, att'y for def'ts.

And afterwards, to wit, at a term of the circuit court of the United States, in and for the district of Kansas, begun and held at Topeka, in said district, on Monday, the 24th day of May, A. D. 1869, there were present Hon. Samuel Miller, Hon. Mark W. Delahay, judges.

At which term of said court, on the 27th day of May, A. D. 1869, among other things, proceedings were had in the said case, and appear of record in words and figures as follows, to wit:

24 Thursday, May 27, 1869.

FREDERIC R. HUNT, ASSIGNEE OF WILLIAM T. Keller and Mary K. Gladding, as partners, bankrupts, plaintiff,
vs.
THE SECOND NATIONAL BANK OF LEAVENworth, William P. Borland, and Austin M. Clark, defendants. } 186.

And now on this day comes the plaintiff herein by Hurd & Stillings and Clough & Wheat, his attorneys, and also come the defendants herein by Sherry & Helm, their attorneys; and thereupon this action being by the court called for trial, the parties, plaintiff and defendants, announce themselves ready for trial; and thereupon, to try the
25 issue joined herein, come a jury, to wit, James G. Bunker, S. Y. Woodhull, George Doane, John Martin, M. R. Dalton, B. A. Murphy, G. W. Ludington, J. T. Holmes, John F. Delong, William Curtiss,

Thomas Kneass, and Francis Brown, twelve good and lawful men of the body of the district of Kansas, who, being duly empanneled and sworn to well and truly try the issue herein, and a true verdict to render, according to law and the evidence, after hearing the evidence, argument of the case, and instructions of the court, retire under charge of a sworn bailiff for deliberation, and who afterwards come into open court and return the following verdict:

"We, the jury, find for the plaintiff, and assess the damages at nine thousand and forty-five dollars and forty-four cents, ($9,045 44.)

"S. Y. WOODHULL, *Foreman.*"

26 Whereupon the defendants gave notice of motion for a new trial.

Which said verdict, rendered as aforesaid, is in words and figures as follows, to wit:

"We, the jury, find for the plaintiff, and assess the damages at nine thousand & forty-five dollars & forty-four cents, ($9,045 44.)

"S. Y. WOODHULL, *Foreman.*"

(Endorsed:) No. 186. Verdict.
Filed May 27, 1869.

A. S. THOMAS, *Clerk.*

And afterwards, on the 28th day of May, A. D. 1869, the said defendants, by their attorneys, Sherry & Helm & Burns, filed their motion for a new trial in this case; which said motion is in words and figures as follows, to wit:

United States of America, circuit court.

DISTRICT OF KANSAS, *ss:*

27 F. R. HUNT, ASSIGNEE OF KELLER & Gladding, bankrupts, plaintiff,
vs.
THE SECOND NATIONAL BANK OF LEAVENworth, A. M. Clark, and W. P. Borland, def'ts.
} Motion for new trial.

And now come the said defendants by their attorneys, and move the court here for a new trial in this action, for the following reasons, to wit:

1st. That the damages given by the jury in this case are excessive.

2d. That the verdict given in this case is against, and contrary to, the weight of evidence and law of the case.

3d. That the court erred in the trial of this cause in refusing to charge the jury that: "If the jury believe from the evidence that
28 the conveyance by the firm of Keller & Gladding, made July, 1867, was made in pursuance of the original agreement between them and the bank, they are to regard said sale or transfer as valid, and not in contemplation of evading the provisions of the bankrupt law."

4th. That the verdict of the jury is contrary to the law and the evidence.

SHERRY & HELM and BURNS,
Att'ys for Defendants.

Which said motion was and is endorsed as follows, to wit:

186. F. R. Hunt, assignee, vs. Second National Bank et al. Motion for new trial.
Filed May 28, 1869.

A. S. THOMAS, *Clerk.*

29 And afterwards, at the said May term, 1869, of said court, begun and held as aforesaid, further proceedings were had in this case, and appear of record in words and figures as follows, to wit:

Friday, May 28, 1869.

FREDERIC R. HUNT, ASSIGNEE OF WILLIAM T. Keller & Mary K. Gladding, as partners, bankrupts, plaintiff,
vs.
THE SECOND NATIONAL BANK OF LEAVENworth, William P. Borland, and Austin M. Clark, defendants. } 186.

And now on this day again comes the plaintiff herein by his attorneys, and also come the defendants herein by Sherry & 30 Helm, their attorneys; and then the said defendants, by their said attorneys, moved the court to vacate and set aside the verdict rendered herein, and to grant a new trial of this action; and the court, having heard and duly considered said motion, overruled the same; to which ruling and decision of the court said defendants then excepted.

It is therefore now by the court here considered, ordered, and adjudged that said plaintiff, Frederick R. Hunt, assignee of William T. Keller and Mary K. Gladding, as partners, bankrupts, have and recover of and from said defendants, The Second National Bank of Leavenworth, William P. Borland, and Austin M. Clark, the sum of nine thousand and forty-five dollars and forty-four cents, and also his costs by him about his suit in this behalf expended, and that execution issue therefor.

31 And the said defendants now present their bill of exceptions to the court, which is allowed and signed, and, on their motion, is ordered to be made a part of the record in this case; which said bill of exceptions, presented, allowed, and signed, and ordered to be made a part of the record in this case as aforesaid, and filed on the 28th day of May, A. D. 1869, is in words and figures as follows, to wit:

United States of America, circuit court.

DISTRICT OF KANSAS:

F. R. HUNT, ASSIGNEE OF KELLER & GLADding, bankrupts, pl'ffs,
vs.
THE SECOND NATIONAL BANK, W. P. BORland, and A. M. Clark, def'ts.

32 Be it remembered that, on the trial of this cause in the circuit court of the United States for the district of Kansas, at the May

term thereof, A. D. 1869, evidence had been given, on the part of the plaintiffs, tending to show that said bankrupts had made a conveyance of their certain stock of goods, liquors, &c., to said defendants when said bankrupts were in contemplation of insolvency, and were insolvent, and that said defendants had reasonable ground for believing that said bankrupts were insolvent at the time of said conveyance, and that the transfer was not in the usual course of the business of the bankrupts, and that on the day of August, A. D. 1866, said bankrupts executed their certain instrument to said defendants in the form and manner of a chattel mortgage, which said instrument was not filed for record as required by law.

33 Which said instrument, in the form and manner of a chattel mortgage, is in the words and figures as follows, to wit:

"*Chattel mortgage.*

"This indenture, made the first day of August, in the year of our Lord one thousand eight hundred and sixty-six, between William T. Keller, Mary K. Gladding, & Thomas S. Gladding, doing business under the name and style of Keller & Gladding, of the one part, and William P. Borland, cashier of The Second National Bank of Kansas, of the other part, witnesseth that the said parties of the first part, for and in consideration of the sum of eight thousand dollars ($8,000) to him in hand paid by the said parties of the second part, at or before the

34 sealing and delivering of these presents, the receipt whereof is hereby acknowledged, do grant, bargain, and sell unto the said party of the second part, all and singular the goods and chattels hereinafter mentioned; that is to say:

"One hundred barrels of whiskey, (100 bbls.;) ten barrels of brandy, (10 bbls.;) five barrels of plantation bitters, (5 bbls.;) ten casks of port wine, (10 casks;) six casks of sherry wine, (6 casks;) gin; rum; segars, &c., &c., together with all the stock of liquors, segars, &c., now in store in the northeast corner of Second and Cherokee streets, of Leavenworth City, Kansas, belonging to the said parties of the first part:

"To have and to hold all and singular the goods and chattles hereinbefore granted, bargained, and sold, or mentioned, or intended so to be, unto the said party of the second part forever, said goods and chattles now remaining and continuing in the possession of the said par-

35 ties of the first part in their brick storehouse at the place above described:

"Provided always, and these presents are upon the express condition, that if the said parties of the first part shall and do well and truly pay or cause to be paid to the said party of the second part the sum of eight thousand dollars according to their two certain promissory notes of even date hereof, as follows: One note, payable sixty days after date, for the sum of four thousand dollars, with interest at 12 per cent. per an'm after maturity, and payable to the order of the second part at The 2d National Bank of Kansas; the other for the same amount, and payable in ninety days to the order of the second part, with interest at 12 per cent. per an'm, after maturity, and payable at The 2d National Bank of Leavenworth, Kansas, (each note above described for four thousand dollars is the property of The 2d National Bank of Leavenworth, Kansas,) then these presents, and every matter herein contained, shall cease and be null and void; but in case default shall be

36 made in payment of the said sum of money above mentioned, or the interest thereon, or any part thereof, at the time above

limited for the payment of the same, or if the said parties of the first part shall sell, assign, or dispose of, or attempt to sell, assign, or dispose of, the whole or any part of the said goods and chattles, or remove or attempt to remove the whole or any part thereof from the said brick storehouse aforesaid, without the written assent of the parties of the second part, then and from thenceforth it shall and may be lawful for the said party of the second part, his executors, administrators, or assigns, or his authorized agent, to enter upon the premises of the said parties of the first part, or any place or places where the said goods and chattles, or any part thereof, may be, and take possession thereof, and to sell and dispose of the same for the best price or prices that can be obtained therefor, at public vendue, giving six days' notice of the said sale, by a written or printed notice, to be pasted at one or more public place or places in the said
37 town, and, out of the money to arise by such sale thereof, to pay and retain the said sum of money above mentioned, and the interest thereon, and all charges at such sale, (if so much there shall be,) rendering the surplus moneys (if any there shall be) to the said parties of the first part.

"In witness whereof the parties of the first part have hereunto set their hands and seal the day and year first above written.

"Notes secured by this mortgage stamped.

"WILLIAM I. KELLER. [SEAL.]
"MARY K. GLADDING. [SEAL.]
"THOMAS S. GLADDING. [SEAL.]

"Be it remembered that, on this 7th day of August, A. D. 1866, before me, the undersigned, personally appeared William T. Keller, Mary K. Gladding, and Thomas S. Gladding, who are personally known to me to be the persons whose names are affixed to the foregoing instrument, and have acknowledged the same to be their voluntary act and deed.
38 "In witness whereof I have hereunto set my hand and affixed my notarial seal the day and year first above mentioned.

[SEAL.] "G. W. FACKLER,
"*Notary Public.*"

"(Endorsed:) Chattel mortgage. Keller & Gladding to W'm P. Borland, cashier. Given Aug. 1, 1866. Filed ,18 , at o'clock m."

Whereupon evidence was given on part of defendants tending to show that said bankrupts in the conversations preliminary to the execution of said chattel mortgage for the purpose of securing the present indebtedness of said bankrupts to said Second National Bank, of which said Clark was president, as well as to obtain future advance, did promise said Clark that they the said bankrupts would deliver to
39 the said Second National Bank at any time they should desire or request their entire stock of goods, liquors, and merchandise which they might have on hand at the time said stock should be required of them by said defendants; and that in February, A. D. 1867, in pursuance of said agreement, said bankrupts did actually deliver to said 2nd Nat. Bank a portion of their said stock of liquors, goods, and merchandise, amounting to $2,542 64, or thereabouts; and that afterwards, to wit, on the day of July, A. D. 1867, in pursuance of said agreement, said bankrupts turned over to said Second National Bank the balance of their said stock to said Second National Bank, for the purpose of securing said indebtedness of said bankrupts to said Second Nat. Bank.

Testimony was also given tending to show that the bankrupts continued to sell the goods included in said mortgage and all other
40 goods at their store, with the consent of defendants, until the transfer in July, 1867, and this was contemplated by both parties when the mortgage was made.

And that said defendants, by their attorneys, on the trial of said cause asked for the following instructions to be given to the jury, to wit:

"That if the jury believe from the evidence that the conveyance by the firm of Keller & Gladding made July , A. D. 1867, was made in pursuance of the original agreement between them and the bank, they are to regard the said sale or transfer as valid, and not in contemplation of evading the provisions of the bankrupt law."

Which said instruction the court refused to give to the jury, to which refusal of the court said defendants then and there excepted, and prayed that this bill of exceptions in that behalf might be
41 allowed, which is accordingly done, and upon their motion is ordered to be made a part of the record in this case.

SAM. F. MILLER.

Which said bill of exceptions was and is endorsed as follows, to wit: No. 186. F. R. Hunt, assignee, vs. Second National Bank. Bill of exceptions.
Filed May 28, 1869.

A. S. THOMAS, *Clerk.*

And afterwards, to wit, on the 2d day of June, A. D. 1869, came the said defendants by their attorneys, and filed in the said clerk's office their appeal bond in the said entitled cause; which said appeal bond is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

42 Know all men by these presents that we, James C. Stone and Milton E. Clark, are held and firmly bound unto F. R. Hunt, assignee of William T. Keller and Mary K. Gladding, partners, and bankrupts, in the full and just sum of twenty thousand dollars, to be paid to the said F. R. Hunt, assignee, his certain attorney, executor, administrator, or assign; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this second day of June, in the year of our Lord one thousand eight hundred and sixty-nine.

Whereas lately, in a trial in a suit depending in the circuit court of the United States for the district at Kansas, at the May term of the year A. D. 1869 thereof, between said Hunt, assignee, plaintiff as aforesaid, and The Second National Bank of Leavenworth, William P.
43 Borland, and Austin M. Clark, defendants, judgment was rendered against the said Second National Bank, William P. Borland, and Austin M. Clark; and the said Second National Bank, W. P. Borland, and A. M. Clark having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said F. R. Hunt, assignee as aforesaid, citing and admonishing him to be and appear at the Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Second National Bank, William P. Borland, and Austin M. Clark shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the obligation to be void; else to remain in full force and virtue.

JAMES C. STONE. [SEAL.]
MILTON E. CLARK. [SEAL.]

44 Approved by—

MARK W. DELAHAY,
Associate Justice of the Circuit Court for the District of Kansas.

(Endorsed:) No. 186. F. R. Hunt, assignee of Keller & Gladding, bankrupts, vs. The 2d Nat. Bank of Leavenworth et al. Bond. Filed June 2, 1869.

A. S. THOMAS, *Clerk.*

45 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States for said district of Kansas, do hereby certify the foregoing transcript to be a true, full, and perfect copy from the record and files of all the proceedings had in said court in the case of Frederic R. Hunt, assignee of William T. Keller and Mary K. Gladding, as partners, bankrupts, plaintiff, vs. The Second National Bank of Leavenworth, William P. Borland, and Austin M. Clark, defendants, as the original now remains in the clerk's office of said court in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said district of Kansas, this 30th day of July, A. D. 1869.

[SEAL.] A. S. THOMAS, *Clerk.*

46 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Kansas, greeting:

Because, in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between F. R. Hunt, assignee of William T. Keller and Mary K. Gladding, as partners, bankrupts, plaintiff, and The Second National Bank of Leavenworth, William P. Borland, and Austin M. Clark, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears: we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may leave the same at Washington on the first Monday of December next, in the said Supreme
47 Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the said Supreme Court, this second day of June, A. D. 1869.

[SEAL.] A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed by—

MARK W. DELAHAY,
Associate Justice of the Circuit Court for the District of Kansas.

(Indorsed:) No. 186. F. R. Hunt, assignee of Keller & Gladding, bankrupts, vs. The 2d National Bank of Leavenworth et al. Writ of error.
Filed June 2, 1869.

A. S. THOMAS, *Clerk.*

48 UNITED STATES OF AMERICA, *ss:*

To F. R. Hunt, assignee of William T. Keller and Mary K. Gladding, as partners, bankrupts, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein The Second National Bank of Leavenworth, William P. Borland, and Austin M. Clark are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done in that behalf.

Witness the honorable judge of the district court of the United States for the district of Kansas and of the circuit court of the United States in said district of Kansas.

MARK W. DELAHAY,
Associate Justice of the Circuit Court for the District of Kansas.

49 STATE OF KANSAS, *Leavenworth County, ss:*

I, Edgar E. Hastings, being first duly sworn, depose and say that I served the annexed citation on F. R. Hunt, assignee of Keller and Gladding, bankrupts, by delivering a true copy thereof to him on this the 4th day of June, A. D. 1869.

EDGAR E. HASTINGS.

Subscribed and sworn to before me this 4th day of June, A. D. 1869.

[SEAL.] H. J. DENNIS,
Clerk of the District Court of Leavenworth Co., Kansas.

(Indorsed:) Filed June 5, 1869.

A. S. THOMAS, *Clerk.*

(Indorsement on cover:) No. 343. The Second National Bank of Leavenworth, William P. Borland, and Austin M. Clark, plaintiffs in error, vs. F. R. Hunt, assignee of W. T. Keller and Mary K. Gladding, as partners, bankrupts. Kansas C. C. U. S.
Filed 10th December, 1869.

UNITED STATES OF AMERICA.

SUPREME COURT.

THE SECOND NATIONAL BANK, of Leavenworth, A. M. CLARK & W. P. BORLAND, *Plaintiffs in Error*,

VS.

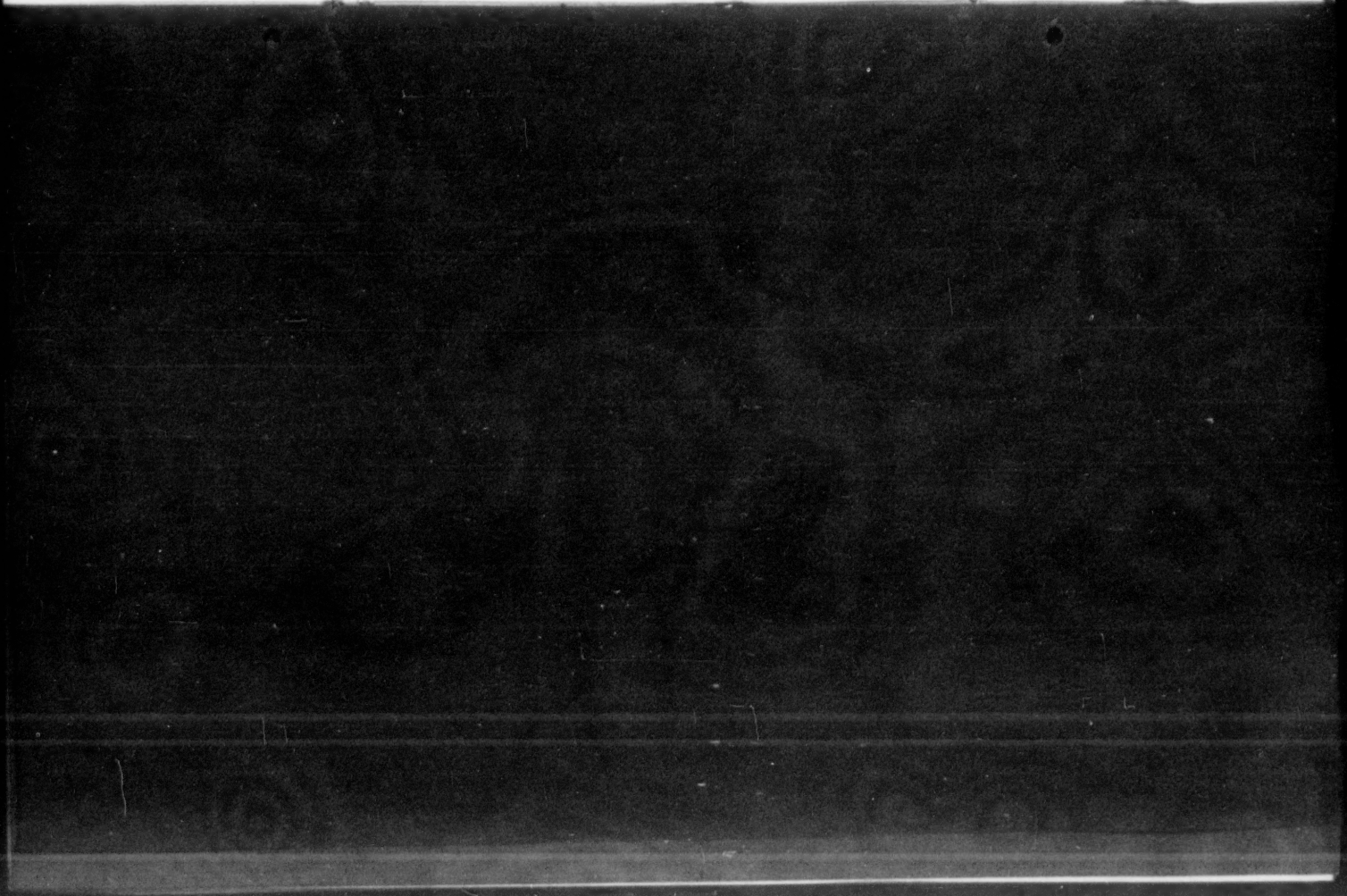
FREDERICK R. HUNT, Assignee of WILLIAM T. KELLER and MARY K. GLADDING, as Partners, Bankrupts,

Defendants.

ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF OF PLAINTIFFS IN ERROR.

SHERRY & HELM,
Attorneys for Plaintiffs in Error.



UNITED STATES OF AMERICA.

SUPREME COURT.

THE SECOND NATIONAL BANK, of Leavenworth, A. M. CLARK & W. P. BORLAND, *Plaintiffs in Error*,

VS.

FREDERICK R. HUNT, Assignee of WILLIAM T. KELLER and MARY K. GLADDING, as Partners, Bankrupts,

Defendants.

ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF OF PLAINTIFFS IN ERROR.

The firm of Keller and Gladding was composed of William T. Keller and Mary K. Gladding and carried on the wholesale liquor business in Leavenworth, Kansas. They were adjudged Bankrupts sometime during the spring of the year, A. D., 1868.

The Second National Bank was a National Bank in the same city, of which institution A. M. Clark, one of the Plaintiffs in Error, was President, and Wm. P. Borland, another Plaintiff, was Cashier.

In August, A. D., 1866, said firm of Keller and Gladding were indebted to said National Bank in a sum not disclosed. The Bank desirous of loaning its surplus money and also to secure the indebtedness of the firm already accrued made a further advance to Keller and Gladding of money to be used in their business. At the time of this advance there was an instrument prepared in the nature of a Chattel Mortgage upon the stock of said firm, whereby the Bank was to have been secured But it appears that this document for some reason was never filed or recorded as provided by Law, and that there was a preliminary verbal understanding betweed Clark, the President of the Bank, and the firm of Keller and Gladding by which it was agreed that said Bank should at any time it might be so disposed take possession of the stock of said firm as their own in payment of the money they had advanced. How long this agreement had existed we are not told, but their relations with the Bank were based on this understanding.

At this time it is not alleged or proved that Keller and Gladding were insolvent, nor is it proved that this agreement extended to their books, notes, and accounts against their customers. The agreement was solely with reference to their stock on hand, and seems to have been a standing and continuous agreement upon which the parties to said agreement had always acted.

In pursuance of this agreement in February, A. D, 1867 (before the existence of any Bankrupt Law) the Second National Bank proceeded to take into its possession some $2,554.40, worth of stock

belonging to said firm. There was no secrecy about the matter, nor was any unnecessary display made in the transfer. There certainly was no necessity for concealment as the Bank could have, under the Laws of the State, taken it all and converted it at once. But not desiring to break them up in their business, the Bank allowed the firm to proceed until it considered it politic to take possession of the entire stock, which it did in July A. D., 1867

Suit was brought by F. R. Hunt, Assignee, and judgment recovered against the Second National Bank, A. M. Clark and Wm. P. Borland for the sum of $9,045.00, in the Circuit Court of the United States for the District of Kansas, at its spring term for the year A. D., 1869.

On the trial of said cause in the Court below, Defendants counsel asked of the Court that the following instruction to the jury be given, to-wit: "That if the Jury believe from the evidence that the conveyance by the firm of Keller and Gladding made July A. D. 1867 was, made in pursuance of the original agreement between them and the Bank, they are to regard the sale or transfer as valid, and not in contemplation of evading the provisions of the Bankrupt Law." This instruction the Court refused to give to the Jury, and said Defendants in said cause in the Court below excepted to said refusal of said Court.

Plaintiffs in Error contend that the agreement existing in August A. D., 1866, was fair and just. Keller and Gladding at that time could have sold the Bank their entire stock for what they owed it as partial consideration. If they could then have sold them their entire stock, certainly an agreement to do so at some future time would have been binding. This agreement was made before

the Bankrupt Law had an existence and even though the transfer was "not in the ordinary course of business" at that time, such sales were not prohibited and were legal. Nor could this agreement have been in contemplation of Bankruptcy, or insolvency, or affected by Bankrupt Laws passed subsequently. The agreement was already in existence in August A. D., 1866, at a time when insolvency is not alleged against them, and the Bankrupt Law approved March 2nd, A. D., 1867. No indebtedness except that of the Second National Bank is proved to have existed against the firm in August, 1866. It is true the stock remained in the possession of Keller and Gladding except such portion thereof as was taken by the Bank in February, A. D., 1867, but the agreement on their part to convey the same was none the less binding on them on that account, and certainly no more prejudicial to creditors, than if the Second National Bank had in August, A. D., 1866, taken entire possession.

Plaintiffs in Error claim that the conveyance to the Bank was in accordance with the agreement made with said Bank by Keller and Gladding, which agreement had been in force during the whole time of their dealings with said Bank and was only executed—first in February, A. D., 1867, partially, and afterwards in July of the same year, completely.

They contend also that such agreement was legal and valid at the time it was made, and that its subsequent execution and performance could not have been in contravention of the provisions of the subsequently passed Act of Congress, known as the Bankrupt Law.

See Carr vs. Burris, 1. *C. M and R.*, *page* 443.
Abbott vs. Scott, 2 *Scott*, 392.
Harris vs. Rickett, 4 *Hurl & Nor. (Exch.) p.* 1
McMeechen's Lessee vs. Grundy & Thornburgh.
3 *Harris vs. Johnson. (Md.) p.* 185.

Receiver People's Saving Bank vs. Paterson Savings Bank
2 *Stockton*, (*N. J.*) *P.* 14.

15 *How. Practice, p.* 95. *Billsboro vs. Titus.*

Smith vs. Merrill, 9 *Gray*, 144.

Hunt vs. Mortimer, 10 *B. & C., p.* 44.

Wheelwright vs. Jackson, 5 *Taunt*, 109.

Fidgeon vs. Sharpe,
1 *Marsh* 196.

Yeates vs. Grovey, 1 *Ves.* 280.

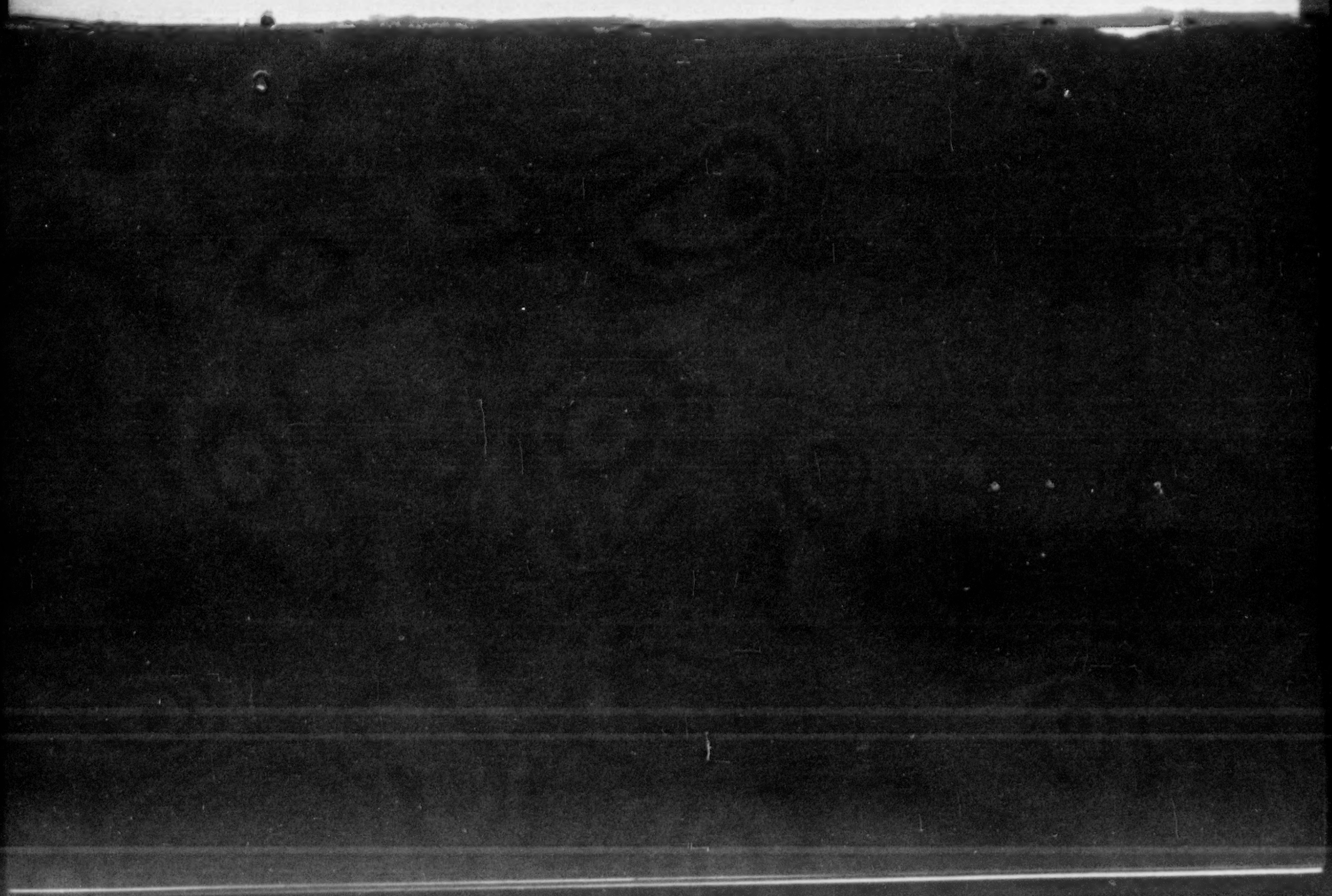
Belcher et al vs. Bittie, 10*th Binghams Rpts. p.* 408.

Carr et al Assignees of Clapham vs. Burdiss & Brummell—Tyrbitts Exchequer Reports, Vol 5, *p.* 136

SHERRY & HELM,

Attorneys for Plaintiffs in Error.

Tho Ewing Jr
of Counsel



SUPREME COURT OF THE UNITED STATES.

No. 343.

THE SECOND NATIONAL BANK OF LEAVENWORTH, WILLIAM P. BORLAND, AND AUSTIN M. CLARK, PLAINTIFFS IN ERROR,

vs.

F. R. HUNT, ASSIGNEE OF W. T. KELLER AND MARY K. GLADDING, AS PARTNERS, BANKRUPTS.

ARGUMENT FOR DEFENDANT IN ERROR.

HURD & STILLINGS,
CLOUGH & WHEAT,
Atty's for Def't in Error.

IN THE SUPREME COURT

OF THE UNITED STATES.

THE SECOND NATIONAL BANK OF LEAVENWORTH, WILLIAM P. BORLAND, and AUSTIN M. CLARK,

Plaintiffs in Error,

vs

FREDERIC R. HUNT, Assignee of WILLIAM T. KELLER, and MARY K. GLADDING, as Partners, Bankrupts,

Defendant in Error.

Argument for Defendant in Error.

At the May Term 1869 of the Circuit Court of the United States for the District of Kansas, Defendant in Error recovered judgment against Plaintiffs in Error for $9,045 $\frac{44}{100}$ and costs, because of the matters mentioned in his petition, (for which see pages 1, 2, 3 and 4 of the printed record), wherein he alleged matters which, if true, show that the Bankrupts, Keller & Gladding, transferred certain property in violation of the 35th and 39th Sections of the act entitled "An Act to establish a uniform system of Bankruptcy throughout the United States," approved March 2d, 1867, and that Plaintiffs in Error were liable to him therefor. (See the clause in said 35th Section in relation to an assignee recovering property, or the value of it, from the person receiving it or benefitted, &c.)

The issue was made in the Circuit Court by Plaintiffs in Error, filing a general denial for their answer to said petition. On the trial, the jury found for the Defendant in Error, and assessed his damages at said sum of $9,045 $\frac{44}{100}$.

Of course as Plaintiffs in Error have not preserved all the evidence, it is now to be considered (as the fact was,) that the evidence was sufficient to sustain the verdict, that is, that the evidence showed sufficient of the allegations in said petition to be true, to entitle Defendant in Error to that verdict.

As we understand the record, *after* said judgment had been rendered, Plaintiffs in Error presented a bill of exceptions, which was then allowed and signed, and ordered to be made a part of the record in the case, (see page 8 of the printed record,) unless this was done, as of the time of trial, (and we submit it does not so appear, but on the contrary, as a matter connected with the motion for a new trial), and therefore we claim it cannot now be considered by this Court, and in support of this claim we refer to

9 Wheaton, 651. *6 Wendell, 278.*
4 Peters, 107. *16 Howard, 14–29.*

If the Court shall determine that the bill of exceptions was properly taken so as to be considered a part of the record, then we submit that the Court did not err in refusing to instruct the jury as requested by Plaintiffs in Error, in the words following, to wit:

"That if the jury believe from the evidence that the conveyance by the firm of Keller & Gladding made July , A. D. 1867, was made in pursuance of the original agreement between them and the bank, they are to regard the said sale or transfer as valid and not in contemplation of evading the provisions of the Bankrupt Law."

We suppose by the words *original agreement*, as used in said instruction, Plaintiffs in Error intended to refer to the supposed promise of the bankrupts to Clark, to deliver to the Second National Bank, at any time *they* should desire or request their

entire stock of goods, and which they might have on hand at the time said stock should be required of them by said Plaintiffs in Error (shown on page 10 of the printed record).

This instruction as thus asked, would, if given, have taken from the jury, the consideration of many questions which it was their province to determine, among others equally important, those as to whether the *preliminary conversations*, were sufficient to amount to a contract, including matter of *consideration* &c., or *not*, (which we submit they did not), or whether the pretended *original agreement* therein indirectly claimed to have been made, was *bona fide* or not, or whether it had, or had not been supplanted by any other matter either in whole, or in part; said instruction if given, would also have taken from the jury the question as to whether there was any such original agreement as therein referred to, or not; whilst it does not even appear, that there was any evidence tending to show that Clark, or any one else for the bank, or for any one, accepted such pretended promise, (even if it was made), but on the contrary, it *prima facie* appears that such supposed promise was not accepted, because the chattel mortgage was taken, which shows, (conclusively we submit), that those representing the bank, preferred to have the chattel mortgage, rather than to rely on any of the conversations, had *preliminary* to the execution thereof.

But whether so or not, that instruction, if given would have informed the jury that the Court was of the opinion that such supposed *original agreement* had been made, and that therefore the jury need not trouble themselves to determine whether any ORIGINAL AGREEMENT *of a certain nature* had been made or not, but that if they, the jury believed from the evidence that the conveyance (of course referring to matter shown by the evidence), by the firm of Keller & Gladding, made July —— A. D. 1867, was made in pursuance of the (by the Court) supposed original agreement, they were to regard the said sale or transfer as *valid*, *and not* in contemplation of evading the provisions of the bankrupt law, and thus, *so far as* the Defendant in Error claimed to recover, *because* of the transfer having been made for the purpose of evading the provisions of the bankrupt law, the case would, if said in-

struction had been given, have been taken from the jury, except only as to the question whether the conveyance was made in pursuance of such supposed original agreement or not; even if the evidence had been sufficient to warrant the jury in finding such an *original agreement* had been made, we submit it would not have been proper for the Court to have so far usurped the province of the jury as to have determined itself that there was such an agreement, but even if under some circumstances with evidence of a conclusive character, the Court might determine that such an agreement had been made, as such evidence is not contained in the bill of exceptions, this Court cannot presume there was such evidence given in the Circuit Court; but on the contrary, according to what we understand the universal rule in such cases to be, will, we suppose, in support of the ruling of that Court, presume that as the evidence was, it was not proper for it to give such instruction.

And further, we draw attention to the rule of law that a *mere* promise, unless *made* for a *consideration* and *accepted*, is not obligatory, but is void.

1 Chitty on Pleading, 293 and 297.
13 Wendell, 126.
21 Wendell, 138–9 and 141.
17 Iowa, 492.
4 Kansas, 385.
13 Ohio St., 324.
12 Johnson, 190–397.
32 New Jersey, 504–9 and 510.
7 Watts, 48.

That the Court did right in refusing to usurp the province of the jury, see

4 Cranch, 71.

The Court cannot give an instruction which makes the case turn on one point only, when there are other grounds necessary to be passed upon by the jury, nor one which assumes as true a controverted fact.

Adams vs. Roberts, 2 Howard, 486.

See, also

Ewing vs. Burnet, 11 Peters, 50.
U. S. vs. Laub, 12 Peters, 1.
19 Howard, 263 and 20 Howard, 170.

It appears from the record (see the recitals in the copy of the Journal Entry, about the proceedings immediately preceding the retirement of the jury, on page 7, printed record), that the Court gave instructions to the jury; as Plaintiffs in Error did not see fit to set them forth in their bill of exceptions, of course the presumption is that they were *such*, and *all such* instructions, as it was proper for the Court to give to the jury.

And further, it is evident that the chattel mortgage shown on pages 9 and 10 of the printed record, was made *after* the so-called original agreement was, if any agreement was made, and therefore all the *conversations preliminary* to the execution of said chattel mortgage in which such promises were claimed to have been made, were with such promises, merged in said mortgage.

1 Peters, 598.
2 Kernan, 561.
20 N. Y., 493.
4 Kansas, 160.
37 Maine, 351.

(See also the authorities hereinafter cited, in relation to oral evidence)

By reference to section 12, page 290, of the Territorial Laws of Kansas, of 1859, republished on page 355, of the compiled Laws of Kansas, of 1862, it will be seen that the mortgagee of personal property held the legal title, and right of possession in Kansas, under that section, which continued in force until after the transaction shown by the record in this case, occurred; and until the 15th section, on page 585, of the General Statutes of Kansas, of 1868, took effect.

The mortgagee in said chattel mortgage, therefore, held the legal title to the property thereby mortgaged, and the right to the possession thereof except in so far (if at all), as provision to the contrary was *expressly* made by said mortgage.

20 Barb., 616, and 4 Michigan, 295, and the numerous cases therein cited.

Which cases we think show that the right of possession was in the mortgagee, if the mortgage had not been void.

Therefore, of course, the preliminary conversations were of no force—and we submit that these cases are sufficient to sustain our claim that the *preliminary conversations* did not amount to an original agreement at all—certainly not to one with the effect claimed by the instruction.

That a contract cannot be partly in writing and partly oral to the extent, or in the manner, claimed by Plaintiffs in Error is, we think, shown by many cases, among which may be enumerated the following:

22 Ind., 171-7.
14 Ind., 499.
15 Ind., 59.
34 Maine, 93.
35 Maine, 368.
16 Iowa, 321.
7 H. & Nor., 1046-7.
13 Ills., 689.
30 Mo., 130.
12 East., 6 to 11.
17 Mass., 571.
4 Dallas, 340.
6 Conn., 14.
1 Greenleaf on Ev., sec. 275,

Especially so in this case, where by the mortgage (and the law as applicable thereto, which by the intention of the parties was a part of the contract), the parties thereto *in writing* made provision in relation to the matter of possession, 4 Kansas, 160 and 172-3, (so far as they then had or could have control of the same), the mortgage by its legal effect giving to the mortgagee the right to the possession of the mortgaged property, as between the parties thereto; and even if any right of possession was by the mortgage reserved to the mortgagors, they only had such right because of such reservation.

At the top of page 11, of the printed record, it appears that there was evidence given tending to show that the bankrupts continued to sell the goods included in said mortgage and all other goods at their store, with the consent of Plaintiffs in Error, until the transfer in July, 1867, and that such sale was contemplated by all parties thereto, when the mortgage was made.

That therefor, said mortgage, if the fact was, as such evidence tended to show the facts to be—as well as any such supposed original agreement and said preliminary conversations, if they had any force as an agreement—were fraudulent and void as to creditors,

both at Common Law and under Sections 1 and 2, on page 422, of the Territorial Laws of Kansas, of 1859, which were republished on pages 568–9 of the Compiled Laws of Kansas, of 1862, see

5 Ohio State, 1. *28 Missouri, 173.*
18 Illinois, 396. *4 Comstock, 589.*

and the authorities cited in these four cases, and also

In re Manly. *3 Bankrupt Register, 75.*

and

In re Karley, et al. *3 Chicago Legal News, 85.*

It appears to us that any original, or other agreement of the nature claimed in said instruction to have been made, would be void as to creditors at common law, and because of the aforesaid sections 1 and 2. See cases last above cited and also

6 Wallace, 78. *1 Am. L. Cases, 68.*

And also, because against the policy of the laws of Kansas, as shown by the Act in relation to Chattel Mortgages, on pages 722-3 of the Compiled Laws of Kansas, of 1862.

As we understand the record, it does not appear therefrom, whether the goods, etc., for the transfer etc., of which, by the bankrupts, in violation of the aforesaid Act of Congress, Defendant in Error recovered the judgment complained of, were or were not included in said chattel mortgage, or whether they were, or were not owned by said Keller & Gladding, when said *preliminary conversations* were had, or when (if at all), such supposed original agreement was made; therefore, of course, Plaintiffs in Error cannot now be heard to claim that in either of such cases they would have been entitled to a different ruling (though we do not ourselves see how they would have been entitled to the instruction in any event); for this reason alone, we suppose that authorities to the effect that a sale before delivery will sometimes, if bona fide, etc., be upheld, are not in point in this case (we refer to cases of the class of 4 Hurl. & Norman 1, 72 E. C. L. R., 15), in relation to

which cases and any others of similar import, we refer to Graham vs. Chapman, 74 E. C. L. R., 85, and the last paragraph in the syllabus in the case of

Arnold, et al., vs. Maynard, 2 Story, C. C. 350.

And even those cases in 4 H. & N. 1, and 72 E. C. L. R., 15, or those in 3 Harris & Johnson, 185, and 10 N. J. Ch., 13, (all which we suppose will be cited by Plaintiffs in Error), would not, as we understand them, have justified the giving of such instruction, even if those cases were applicable to the evidence, as the instruction was more sweeping in its expressions and left less to the jury, and ignored other matters, more than any rule of law announced in those cases would warrant.

And further, it was, of course, the duty of the Circuit Court, before which all the evidence was, to determine whether such instruction ought to be given or not, and without having all the evidence here, nor even all the evidence bearing on this point, this Court, as we understand the rule, will not now undertake to say that there was not such evidence given on the trial, as made it the duty of the Circuit Court to refuse to give said instruction, even if this Court should be of the opinion that such an instruction could in any probable case be proper to be given.

And further from the statements, at the top of page 9 of the printed record, it appears that evidence had been given which tended to show the transfer illegal for other reasons, than merely that of having been made in contemplation of evading the provisions of the bankrupt law—which is only one of the many causes mentioned in the aforesaid 35th and 39th Sections of the Act of Congress aforesaid, which might render the transfer illegal, and as some other of said causes, is by said statement at the top of said page 9, shown to have had evidence to support them, and also, as is above shown, as the evidence tended to show the transactions about the matter between the Bankrupts and the Plaintiffs in Error, to have been fraudulent and void as to creditors, both at common law and because of the statute of frauds &c., of Kansas; therefore, we submit it would have been erroneous for the Court to have given said instruction, because of the words

"they are to regard the said sale or transfer, as valid," being therein, because the sale or transfer might have been made in pursuance of the imaginary *original agreement* and still have been *invalid;* it was we submit, not enough for Plaintiffs in Error, to have obviated one objection merely to the transfer, and then claim it should be considered *valid*, without having disposed of the other equally fatal objections thereto.

And further suppose the evidence recited in the bill of exceptions to have been given, and in addition thereto, evidence had been given, showing clearly, that the transfer to Plaintiffs in Error, was made as a secret trust for the benefit of Keller & Gladding, by which the transaction would have been void as to creditors, then the instructions asked, would have taken that branch of the case from the jury.

Or suppose that by the terms of the transfer, Keller & Gladding were to retain the possession of the property, and deal with it as before, and pay the bank debt, and retain the balance for their own use, and have the aid of the Plaintiffs in Error, to secrete the surplus from their creditors, certainly then, such instruction should not have been given.

We are supposing facts which are wholly consistent with the evidence recited, and if we may be allowed to so state, facts which were proved in the case.

Finally, we submit that under the second clause of Rule 23, of this Court, damages should be awarded to the Defendant in Error in this case, at the rate of ten per cent. per annum, on the amount of the judgment of the Circuit Court in this case, from the date of the rendition of said judgment—as the record shows that the Writ of Error in this case, has delayed the proceedings on the judgment of the Circuit Court, and shows, quite as conclusively, as we think, that said writ was sued out *merely for delay.*

E. STILLINGS,
L. B. WHEAT,
Attorneys for Defendant in Error.

LEAVENWORTH, KANSAS, December 23, 1870.